IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 79

LEHIGH VALLEY COOPERATIVE FARMERS, INC., ET AL., *Petitioners,*

v.

UNITED STATES, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICI CURIAE FOR DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION, INC., ET AL.

PRELIMINARY STATEMENT

This brief in support of the Respondents, the United States of America and the Secretary of Agriculture, is filed pursuant to leave of the Court on behalf of the following organizations:

Dairymen's League Cooperative Association, Inc. New York, New York

Eastern Milk Producers Co-operative Association, Inc., East Syracuse, New York

Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., Syracuse, New York
Mutual Federation of Independent Cooperatives, Inc., Syracuse, New York
United Milk Producers Cooperative Association of New Jersey, Trenton, New Jersey
Connecticut Milk Producers Association
Hartford, Connecticut
Independent Dairy Farmers Association, Inc.
Fort Lauderdale, Florida
Mississippi Milk Producers Association
Jackson, Mississippi
New England Milk Producers' Association
Boston, Massachusetts
Ohio Milk Producers Federation
Columbus, Ohio
Texas Milk Producers Federation
New Braunfels, Texas
Twin Ports Co-Op Dairy Association
Superior, Wisconsin
United Dairymen's Association
Seattle, Washington
United Farmers of New England, Inc.
Boston, Massachusetts

The Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., is a federation composed of 86 federated and 7 affiliated cooperative corporations located in New York, Pennsylvania, New Jersey and Vermont. The following corporations, totaling 87 in number, have expressly indicated their agreement with the position of the federation in supporting Respondents in this matter:

Adams Center Milk Producers Cooperative, Inc.
Adams Producers Co-Operative, Inc.
Addison Milk Producers Coop. Assn., Inc.
Amsterdam Milk Producers Coop., Inc.
And-Well Producers Cooperative, Inc.

Bear Lake Coop. Milk Producers Assn.
Bennington County Cooperative Creamery, Inc.
Bovina Center Cooperative Dairy, Inc.
Brier Hill Milk Producers Cooperative, Inc.
Burke Milk Producers Cooperative, Inc.
Burlington County Cooperative Milk Producers' Association, Inc.
Campbell Milk Producers Coop., Inc.
Canajoharie Coop. Milk Producers, Inc.
Canoe Camp Cooperative Milk Producers Association, Inc.
Canton Producers Cooperative, Inc.
Cape Vincent Milk Producers Cooperative, Inc.
Central New York Cooperative Association, Inc.
Champlain Milk Producers Cooperative, Inc.
Chateaugay Milk Producers Coop., Inc.
Chautauqua Maid Cooperative, Inc.
Churubusco Milk Producers Cooperative, Inc.
Circleville Milk Producers Coop., Inc.
Cooperative Dairymen of Cannonsville, N. Y., Inc.
De Kalb Producers Cooperative, Inc.
East Freetown Milk Producers Cooperative, Inc.
Edwards Milk Producers Cooperative, Inc.
Ellenburg Milk Producers Coop., Inc.
Fair Haven Milk Producers, Inc.
Finger Lakes Milk Producers Cooperative, Inc.
Fort Edward Milk Producers Association, Inc.
Galeton Coop. Milk Producers Assn., Inc.
Gouverneur Cooperative Dairymen, Inc.
Gracie Dairy Cooperative Association, Inc.
Harford Milk Producers Cooperative, Inc.
Hunterdon County Cooperative Milk Producers' Association
Keuka Milk Producers Cooperative, Inc.
Konhokton Milk Producers Cooperative Association, Inc.
Leon Milk Producers Cooperative, Inc.
Liberty Valley Coop. Milk Prod. Assn., Inc.
Lisbon Producers Cooperative, Inc.
Madrid Milk Producers Cooperative, Inc.

Malone Milk Producers Cooperative, Inc.
Martville Milk Producers Cooperative, Inc.
Mercer County Milk Producers Association, Inc.
Middlebury Coop. Milk Prod. Assn., Inc.
Middlesex County Cooperative Milk Producers Association
Milanville Milk Producers Association, Inc.
Monmouth County Cooperative Milk Producers' Association, Inc.
Montgomery Eastern Dairy Cooperative, Inc.
Montgomery Producers Cooperative, Inc.
Mooers-Irona Milk Producers Cooperative, Inc.
Morris County Cooperative Milk Producers' Association, Inc.
Mount Joy Farmers Cooperative Assn.
Nicholson Cooperative Milk Producers Association, Inc.
Norfolk Producers Cooperative, Inc.
North Country Producers Coop., Inc.
Northern Adirondack Milk Producers Cooperative, Inc.
Ogdensburg Coop. Milk Producers, Inc.
Orange-Ulster County Milk Producers Cooperative, Inc.
Osceola Milk Producers Cooperative Association, Inc.
Oswegatchie Milk Producers Coop., Inc.
Otselic Valley Milk Producers Cooperative Association, Inc.
Owasco Valley Producers Cooperative, Inc.
Pierrepont Manor Milk Producers Cooperative, Inc.
Poland Milk Producers Coop. Assn., Inc.
Port Allegany Cooperative Milk Producers Association
Portville Milk Producers Cooperative, Inc.
Potsdam Milk Producers Cooperative, Inc.
Preble Milk Cooperative Association, Inc.
Roseville Coop. Milk Producers Assn., Inc.

Salem County Cooperative Milk Producers' Association, Inc.
Sherburne Milk Producers Cooperative, Inc.
Slate Hill Producers Cooperative, Inc.
Smyrna Union Cooperative, Inc.
Somerset County Cooperative Milk Producers Association
South Dayton Milk Producers Cooperative, Inc.
South Montrose Dairy Cooperative, Inc.
Steamburg Milk Producers Coop., Inc.
Sugar Grove Cooperative Milk Producers
Sussex County Co-operative Milk Producers Association, Inc.
Towanda Valley Coop. Creamery Association, Inc.
Warren County Cooperative Milk Producers' Association, Inc.
Watertown Milk Producers Cooperative, Inc.
Welsh Producers Coop. Milk Marketing Association, Inc.
West Burlington Coop. Milk Prod., Inc.
Westfield Coop. Milk Producers Association, Inc.
West Leyden Producers Coop. Assn., Inc.

The Mutual Federation of Independent Cooperatives, Inc., is composed of 47 federated cooperative corporations located in New York and Pennsylvania. Mutual is authorized to act on behalf of each of its constituent members in supporting Respondents in this matter. They are:

Andes Co-operative Creamery, Inc.
Border Bulk Tank Milk Producers Cooperative, Inc.
Bridgewater Dairy Farmers Cooperative, Inc.
Canastota Milk Producers Cooperative Association, Inc.
Central New York Bulk Producers Cooperative, Inc.
Chateaugay Cooperative Marketing Association, Inc.

The Chenango Valley Farmers Co-operative Company, Inc.
Clemo Milk Producers Cooperative Association
Clinton County Dairymen's Cooperative Association
Conesus Milk Producers Cooperative Assn., Inc.
Conklin Dairy Farmers Cooperative, Inc.
Cooperative Dairy Farmers of Bellefonte, Pa.
Cooperative Dairy Farmers of Lewisburg, Pa.
Cooperative Dairy Farmers of Middleburg, Pa.
Cooperative Dairy Farmers of Mill Hall, Pa.
Cooperative Dairy Farmers of Spring Mills, Pa.
Coventry Producers Cooperative, Inc.
Croghan Milk Producers Cooperative, Inc.
Crowley's Milk Producers Cooperative Association, Inc.
Fly Creek Valley Co-Operative, Inc.
Guilford Producers Cooperative Association, Inc.
H. P. Farmers Cooperative, Inc.
Kirkland Milk Producers Cooperative, Inc.
Lakes Milk Cooperative, Inc.
Lisle Producers Cooperative, Inc.
Lowville Producers Dairy Cooperative, Inc.
Millport Milk Producers Cooperative Association
North Lawrence Milk Producers Cooperative Association, Inc.
North Penn Bulk Milk Producers Cooperative, Inc.
Oneida Castle Milk Producers Cooperative, Inc.
Ontario Milk Producers' Cooperative, Inc.
Penn York Bulk Milk Producers Cooperative, Inc.
Plattsburg-Chazy Milk Producers Cooperative, Inc.
Producers Cooperative, Inc.
Rockdale Producers Cooperative Association, Inc.
Rock Royal Cooperative, Inc.
Schoharie County Cooperative Dairies, Inc.
Shawangunk Co-operative Dairies, Inc.

Sherrill-Highbridge Milk Producers Cooperative, Inc.
South Cayuga Bulk Milk Cooperative, Inc.
Southern Tier Bulk Milk Producers Cooperative, Inc.
Sullivan County Co-operative Dairy Association, Inc.
Syracuse Dairy Farmers Cooperative, Inc.
Troy Milk Producers Cooperative, Inc.
Van Hornesville Milk Producers Cooperative, Inc.
Washington and Rensselaer Counties Producers Cooperative Association, Inc.
West Coxsackie Milk Producers Cooperative, Inc.

The Texas Milk Producers Federation is composed of 6 federated cooperative corporations representing approximately 8,500 producers located in the States of Texas, New Mexico and Oklahoma, each of which has expressly indicated its agreement with the position of the Federation in supporting the Respondents in the present case. They are:

North Texas Milk Producers Association
Central West Texas Milk Producers Association
Mid-Tex Milk Producers Association
Producers Association of San Antonio
Coastal Bend Milk Producers Association
South Texas Producers Association

The Ohio Milk Producers Federation is composed of 11 federated cooperative corporations representing approximately 15,000 producers in the States of Ohio, Indiana, Pennsylvania, West Virginia, Michigan and Kentucky. Each of the federated corporations has expressly indicated its agreement with the Federation in supporting the position of the Respondents in this matter. They are:

Akron Milk Producers, Inc.
Stark County Milk Producers Association

Milk Producers Federation of Cleveland
Cooperative Pure Milk Association
Cincinnati Milk Sales Association
Miami Valley Milk Producers Association
Central Ohio Cooperative Milk Producers, Inc.
Southeastern Ohio Cooperative Dairy Sales Association, Inc.
Northwestern Cooperative Sales Association
Dairymen's Co-Operative Sales Association
Ross County Milk Producers Association, Inc.

The United Dairymen's Association is composed of 40 federated cooperative corporations, 10 of which are subject to Federal milk marketing orders and represent approximately 2,600 producers in Washington and Idaho. Each of these has expressly indicated its agreement with the position of the Association in supporting Respondents in this matter. They are:

Whatcom County Dairymen's Association
Skagit County Dairymen's Association
Snohomish County Dairymen's Association
Lewis-Pacific Dairymen's Association
Kittitas County Dairymens Association
Grays Harbor Dairymens Association
Seattle Milk Producers Association
Washington Milk Producers Association
Tacoma Milk Producers Association
Inland Empire Dairymen's Association

The map inserted at the back of this brief sets forth the New York-New Jersey milk marketing area subject to the complementary Federal, New York and New Jersey Orders, and the pool plants supplying such area; also the adjoining Philadelphia, Pennsylvania, milk marketing area subject to Federal Order No. 61. 7 C.F.R., Part 961.

OPINIONS BELOW, JURISDICTION, THE STATUTES INVOLVED, THE STATEMENT OF THE CASE

For the purposes of this brief the *amici curiae* adopt the statements found in the brief for the Respondents, the United States and the Secretary of Agriculture, with respect to the opinions below, jurisdiction of this Court, the statutes involved, and the statement of the case. In addition, the following supplemental statement is made:

The compensatory payments by Lehigh and Suncrest were made, and the moneys therefrom are being held in the registry of the District Court *pendente lite*, not under a Federal program but under a single, joint Federal-New York State-New Jersey State program supported jointly by Federal Order No. 27 (7 C.F.R., Part 927, hereinafter referred to as the Federal Order) issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (50 Stat. 246, as amended, 7 U.S.C. § 601 et seq.), and two State Orders whose terms are identical in all material respects with the Federal Order. These State Orders are: Revised Official Order No. 126, issued by the Commissioner of Agriculture and Markets of the State of New York, pursuant to the laws of that State (hereinafter referred to as the New York Order); and Revised Official Order No. 57-3, issued by the Director of the Office of Milk Industry, Department of Agriculture of the State of New Jersey, pursuant to the laws of that State (hereinafter referred to as the New Jersey Order). Copies of the relevant portions of the New York State Order are set forth in Supplement A to this brief. Copies of the relevant portions of the New Jersey State Order will be found in the Supplement to the brief of the State of New Jersey.

Not only are the Federal, New York, and New Jersey Orders identical in all material respects, including the provisions relating to compensatory payments, but also all three apply to milk of all pool plants and to all milk of non-pool plants shipped to, received in, or distributed in the New York-New Jersey milk marketing area. Orders § 927.83(a). All three Orders are administered jointly by a single official, a Market Administrator, appointed jointly by the United States Secretary of Agriculture, the Commissioner of Agriculture and Markets of the State of New York, and the Director of the Office of Milk Industry, Department of Agriculture of the State of New Jersey. There is a single producers' settlement fund (hereinafter referred to as the equalization fund) administered by the Market Administrator, into which payments (including compensatory payments), and from which disbursements, under all three Orders are made. Moneys in the equalization fund, including compensatory payments, are not segregated or earmarked on the basis of one or the other of the three Orders.

The program regulating the marketing of milk in the New York-New Jersey milk marketing area, is a single, joint program resting jointly on the Federal and the New York and New Jersey Orders. The three Orders are not complementary in the sense that each carves out for regulation a segment of the commerce in milk in the New York-New Jersey milk marketing area and that the three segments when fitted together equal the totality of that commerce. Thus the New York Order is not confined to New York intrastate commerce, the New Jersey Order to New Jersey intrastate commerce, and the Federal Order to interstate commerce. All three Orders are complementary and concurrent

in the sense that all three concurrently cover the totality of the commerce in milk for the New York-New Jersey milk marketing area.

Lehigh and Sunerest have not contested the validity of the compensatory payment provisions of the New York or New Jersey Orders.

The policy of a single, joint program resting on both Federal and State Orders goes back to the beginnings of the regulating of milk marketed in the metropolitan area around New York City. Congress designed the authority conferred by its Act to the end that Federal Orders should complement and make enforceable any State Order regulating milk marketed in that area. This is developed in Point I of our Argument.

STATEMENT OF THE QUESTIONS INVOLVED

The Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, as amended, 7 U.S.C. § 601, et seq., hereinafter referred to as the Act), has issued an Order, complementary to Orders of the States of New York and New Jersey identical in all material respects, regulating through a single, joint Federal-State program the handling of milk marketed in the New York-New Jersey milk marketing area. The questions are—

1. Whether the Secretary has statutory authority to provide in the Federal Order that a non-pool handler as to fluid milk distributed in the regulated marketing area pay into the producer settlement fund a compensatory payment amounting to the difference between the minimum class prices for fluid and manufactured milk—the handler having elected to make such payment in lieu of being fully regulated under the

Order and it having been found by the Secretary and both of the lower courts that the compensatory payment provision is supported by the record of the administrative hearings, is incidental to other provisions of the Order, and is necessary to effectuate them.

2. Whether the handler is estopped from contesting the validity of the present compensatory payment provision if he elects to make such payment.

3. Whether if the present elective compensatory payment provision is held invalid, the handler then remains subject to full regulation under the Order.

SUMMARY OF ARGUMENT

Section 10(i) of the Act authorizes, but does not require, the Secretary of Agriculture to issue Orders under § 8c complementary to Orders issued by State authorities. The Federal Order in question was issued under that authority as a result of joint action by the Secretary of Agriculture and the States of New York and New Jersey. It took effect only upon the issuance of Orders by those States. The three Orders constitute a joint and concurrent plan of milk regulation necessitated by the decision of this Court in *Baldwin* v. *Seelig,* 294 U.S. 511 (1935). The provisions of the Federal Order requiring compensatory payments are designed to handle the problem of peripheral milk coming into the marketing area, a problem which the States alone would be unable to solve with respect to out-of-state milk. The Federal Act must not be construed to render the Federal Government powerless to act with the States to fashion a joint Federal-State regulatory scheme as contemplated by the statute.

The Secretary's authority to prescribe the compensatory payment provisions of the Federal Order is

found in § 8c(7)(D) of the Act providing that orders shall include terms and conditions "incidental to and not inconsistent with the terms and conditions specified in subsections (5), (6), and (7) of this section and necessary to effectuate the other provisions of such order". The Order classifies milk according to its use and fixes minimum class prices for such uses as provided in § 8c(5)(A) of the Act. Pursuant to § 8c(5)(B) the Order provides for the payment of a uniform price (referred to as the uniform blended pool price) to producers for milk delivered to handlers irrespective of the use made of such milk by the individual handler to whom it is delivered. These pricing provisions of the Act are carried out by pooling all milk subject to minimum prices and accounting for it through the producers' settlement fund (referred to as the equalization fund). The validity of the equalization fund was upheld by this Court in *United States* v. *Rock Royal Co-Operative, Inc., et al.*, 307 U.S. 533 (1939). The compensatory payment provisions of the Order are necessary to maintain the minimum prices and assure the integrity of the equalization fund.

The minimum prices provided for by § 8c(5)(A) of the Act are not prices which must be paid *to* producers for milk, but are prices at which pool handlers must *account* to the equalization fund *for* milk sold to them. The price which must be paid *to* producers for pool milk is the uniform blended pool price provided for in § 8c(5)(B) and determined by the pooling mechanism of the equalization fund.

Not all milk sold in the marketing area is subject to the minimum price provisions of the Federal Order. The application of these prices must be determined with reference to § 8c(11)(A) of the Act. Under that

section milk orders are issued on the basis of marketing areas. Thus, the Secretary must define the marketing area and must determine what milk shall be included in the milk pool for the area. The Secretary has defined the pool milk as "milk received . . . from producers" (7 C.F.R. § 927.40) and defined "producer" as "any dairy farmer whose milk is delivered from a farm to a pool plant" (7 C.F.R. § 927.6). The minimum prices prescribed by the Federal Order are applicable only to the milk which is determined to be in this pool. Thus, only handlers of pool milk are required to account to the equalization fund at the minimum prices established under § 8c(5)(A) of the Act, and only pool handlers must pay the uniform blended pool price to producers required by § 8c(5)(B).

The Petitioners are not handlers of pool milk. Neither Lehigh nor Sunerest is obligated to account to the equalization fund at the minimum prices established by the Order and neither is required to pay the uniform blended pool price to his producers. Each is free under the Order to pay his producers whatever price may be agreed upon without regard to the uniform blended price. The compensatory payments required of the Petitioners under the Order are not, therefore, part of the minimum price and are not subject to the requirement for uniformity prescribed by § 8c(5)(A).

The regulation of pool milk on a *regional* basis as required by § 8c(11)(A) of the Act necessitates some regulation of handlers of non-pool milk who sell their milk in the marketing area for fluid purposes. When non-pool milk is sold in the marketing area, it displaces a like amount of pool milk and forces the pool milk into the lowest valued surplus class utilization. Thus, the pool handler, instead of accounting to the equalization

fund at the Class I price for fluid milk, accounts for the displaced milk at the lower Class III price for manufacturing purposes. Since the uniform blended pool price is merely the average price of all pool milk accounted for to the equalization fund at the established minimum class price for its particular use, it follows that a reduction in the relative amount of Class I milk in the pool results in a lower uniform blended pool price. Unless some device is used to make up the difference to the equalization fund, the producers who constitute the regular supply of pool milk stand to bear the loss. The Order therefore requires the non-pool handler to make a compensatory payment into the equalization fund, thereby making the fund whole and enabling the fund to operate in the manner approved by this Court in the *Rock Royal* case.

Moreover, since the non-pool handler is not obliged to account to the equalization fund for the fluid milk sold within the marketing area, he would, in the absence of a compensatory payment provision in the Federal Order, be free to retain the difference between the Class I price and the Class III price. This amount could be used to increase his own profit or to compete with pool handlers for the patronage of producers. Accordingly, without a compensatory payment requirement the non-pool handler has a competitive advantage over the pool handler. He has all the benefits of a regulated market but bears none of the burden of surplus.

The Secretary found that there is a necessity for compensatory payments and the Judicial Officer, the District Court and the Court of Appeals determined that the Secretary was supported by the record.

The Petitioners rely on the decision of the Court of Appeals for the Second Circuit in *Kass* v. *Brannan*, 196 F. 2d 791 (C.A. 2, 1952), holding that the compensatory payments under the Federal Order are invalid as violative of the uniformity requirement of § 8c(5)(A) of the Act. In reaching this result the Second Circuit held that the compensatory payment is part of the minimum price under § 8c(5)(A) and that since the amount of the compensatory payment plus the initial cost of milk to the handler exceeded the minimum class price of raw milk under the Order, it was inconsistent with § 8c(5)(A).

The *Kass* holding is erroneous because, as already shown, the minimum prices under § 8c(5)(A) do not apply to handlers of non-pool milk. Therefore, the compensatory payment is not part of the minimum price and cannot be inconsistent with it. The Second Circuit also erred in concluding that compensatory payments are designed to equalize costs between handlers of pool milk and handlers of non-pool milk. The Act does not require equalization of such costs, nor does it authorize such equalization. The true purpose of compensatory payments is to compensate the equalization fund for the loss due to displacement of pool milk by non-pool milk to the end that the minimum pricing provisions of the Act can be maintained.

Compensatory payments are moneys belonging to producers of pool milk. The Federal Order properly requires that they be paid into the equalization fund. Payment of these amounts to producers of non-pool milk would not compensate the fund for the loss due to the displacement of pool milk.

Under the terms of the Federal Order, Lehigh and Suncrest were free to elect to become pool plants and

subject to full regulation or to reject such status and become partially regulated through payment of the compensatory payments. Having elected to make compensatory payments, they are estopped to contest their validity.

The scope of the present Order is broad enough to subject handlers to full regulation, including Lehigh and Sunerest. The authority of the Secretary to make such complete regulation has been upheld. In the event the compensatory payment provisions of the Order are held invalid, the rest of the Order will stand and the Petitioners will become subject to full regulation thereunder.

The argument of Lehigh and Sunerest that the compensatory payment provisions of the Federal Order are in conflict with § 8c(5)(G) of the Act presents an issue not passed upon by the courts below. Lehigh and Sunerest are precluded from raising it at this time. Assuming the issue may now be raised, the compensatory payment provisions are not invalidated by § 8c(5)(G). The legislative history of this section of the Act makes it clear that Congress did not intend to deprive the Secretary of power to impose reasonable restrictions on fluid milk in interstate commerce such as those contained in the Federal Order.

ARGUMENT

I. THE FEDERAL ACT IS TO BE CONSTRUED IN THE LIGHT OF ITS HISTORICAL OBJECTIVE OF COMPLEMENTING AND MAKING EFFECTIVE STATE REGULATION OF MILK MARKETED IN THE MARKETING AREA.

The problem of regulation by a State of milk sold within a marketing area in the State by peripheral handlers located outside the State was before Congress in enacting the Agricultural Marketing Agreement Act of 1937. In 1934 this Court held valid basic provisions of the New York Milk Control Laws enacted a year earlier fixing minimum purchase prices to be paid all producers for their milk. *Nebbia* v. *New York*, 291 U.S. 502 (1934); *Hegeman Farms Corporation* v. *Baldwin*, 293 U.S. 163 (1934). However, on March 4 of the following year (1935), this Court held that the State, acting alone, lacked power to prohibit within its borders sales of milk produced outside of New York State and purchased from producers at less than the minimum prices fixed for purchases from producers in New York State. *Baldwin* v. *Seelig*, 294 U.S. 511 (1935). The decision rendered an isolated State program for an interstate milk marketing area impracticable.

It was to remedy the breakdown created by the *Seelig* decision that the Congress enacted § 10(i) of the Act effective August 24, 1935, and reenacted it in 1937, and that the New York State Legislature in the latter year enacted § 258-n of its Agriculture and Markets Law. L. 1937, ch. 383; McKinney's Consolidated Laws of New York, Book 2-B, § 258-n.

Thus, the Act (§ 10(i)) provides that—

> "(i) *The Secretary of Agriculture upon the request of the duly constituted authorities of any*

> *State is directed*, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, *to confer with and hold joint hearings with the duly constituted authorities of any State*, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; *to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities*; and to make available to such State authorities the records and facilities of the Department of Agriculture; . . ." [emphasis supplied]

Congress contemplated that a Federal Order would complement the New York State Order. At the time of the enactment of § 10(i) of the Act, the House Committee on Agriculture in its report (H. Rept. 1241, 74th Cong., 1st Sess., p. 22) stated that:

> "* * * *The new subsection* [§ 10(i)] *authorizes*, but does not require, *the Secretary* * * * *to issue orders* under the provisions of § 8c of the Act *complementary to orders or other regulations issued by the state authorities.* The authorization is to further carry out the declared policy of the title and looks to securing voluntary *uniformity in the formulation, administration, and enforcement of state and Federal programs* relating to the regulation of the production, handling, marketing, and sale of agricultural commodities and their products." [emphasis supplied]

The Senate Committee on Agriculture and Forestry made a similar statement in its report (S. Rept. 1011, 74th Cong., 1st Sess., p. 15) in which the Committee described the authority granted by § 10(i) as one "to carry out the declared policy of the title and looks to securing voluntary uniformity in the formulation, administration, and enforcement of State and Federal programs relating to the regulation of the production, handling, marketing, and sale of agricultural commodities and their products".

Referring to § 10(i) of the Act, Mr. Justice Black has described the Congressional objective of a State-Federal integrated regulatory system through complementary orders in his dissenting opinion in *Hood & Sons* v. *DuMond*, 336 U.S. 525, 560 (1949), the nature of the Congressional objective not being a matter of dispute between the majority and minority of the Court, as follows:

> "In the foregoing provisions Congress manifested its purpose to subject the milk industry to two cooperating authorities: (1) state legislatures and their selected administrative authorities, and (2) the Secretary of Agriculture. Congress did far more than direct a formal, polite cooperation between New York and the Secretary of Agriculture. Recognizing the compelling necessity for a state-federal integrated regulatory system for the milk industry, Congress was careful to leave the door open for the Secretary of Agriculture and state authorities working together to formulate mutually complementary orders in the field. These complementary state-federal laws and orders were to be aimed at precisely the same evils believed to have been generated by chaotic competitive conditions in the milk industry. The objective of both laws was to help impoverished farmers."

On August 26, 1938, pursuant to their respective statutory authorities the Commissioner of Agriculture and Markets for New York and the Secretary of Agriculture of the United States formally entered into a "Memorandum of the Principles of Cooperation to be Observed in the Formulation and Administration of Complementary Orders for Milk for Marketing Areas Located Within the State of New York to be Issued Concurrently by the Secretary of Agriculture and the Commissioner of Agriculture and Markets". See Appendix A of the brief *amicus curiae* filed by the State of New York; *Hood & Sons* v. *DuMond*, 336 U.S. 525, 541 (1949). In the Memorandum it is stated in part that:

> "It shall be the policy of the Secretary of Agriculture and the Commissioner to act jointly in the formulation and issuance of complementary and concurrent orders * * * and in pursuance thereof to jointly arrange for cooperation in the conduct of preliminary investigations, to hold joint or concurrent hearings, to jointly consider the facts contained in the record of such hearings, and to maintain a mutual exchange of views conducive to *common agreement upon all essential provisions prior to the issuance of either order.* The same policy of joint action shall be followed with respect to modifications of or amendments to such orders." [emphasis supplied]

Even prior to the formal signing of the Memorandum, the Secretary and the Commissioner were holding joint hearings on proposed milk marketing orders for the New York metropolitan milk marketing area (3 F.R. 1945; *United States* v. *Rock Royal Co-Operative, Inc., et al.*, 307 U.S. 533, 548 (1939)). These became the Federal and New York State Orders here

under consideration. In adopting the Federal Order on August 5, 1938, the Secretary of Agriculture said:

> "This order shall become effective after the issuance by the Commissioner of Agriculture and Markets of the State of New York of an order containing provisions similar to the provisions of this order and to which this order shall be complementary * * *." 3 F.R. 1951.

The Federal Order was held valid by this Court in the *Rock Royal* case, *supra*.

The compensatory payment provision of the Federal Order in its form pertinent to the present litigation was promulgated by the Secretary of Agriculture in 1953 and has been in effect continuously since that time. On January 12, 1953, the Commissioner of Agriculture and Markets of the State of New York issued a Notice of Hearing (compare Supplement B this brief) in which he stated in part:

> "The Commissioner of Agriculture and Markets of the State of New York promulgated, effective September 1, 1938, Official Order No. 126 regulating the handling of milk in the New York Metropolitan Milk Marketing Area. Such order was promulgated jointly and concurrently with the promulgation by the Secretary of Agriculture of the United States of the latter's Order No. 27 regulating the handling of milk for the aforesaid marketing area. Since their promulgation, such joint and concurrent orders have been jointly revised and amended from time to time by the aforesaid officials. The terms and conditions of the State and Federal orders referred to above have at all times been similar and such orders have been jointly administered."

The Commissioner then proceeded in his Notice to call a hearing "to be held jointly and concurrently

with the United States Department of Agriculture with respect to proposed amendments to the State Order", as well as to the Federal Order. Following the hearings the United States Secretary of Agriculture and the Commissioner of Agriculture and Markets of the State of New York each issued in 1953 identical amendments to their respective Federal and State Orders, including the compensatory payment provision.

The State of New Jersey subsequently became concerned with the problem of pricing milk brought into that State from peripheral plants located outside the State. The minimum prices for milk covered by the New Jersey statutes could not apply to milk marketed in New Jersey from unregulated plants outside the State nor from plants regulated under the Federal and New York State Orders. The minimum prices fixed by New Jersey for milk produced in New Jersey and marketed in northern New Jersey could not be made effective in the face of this competitive situation. A New Jersey milk producers' association proceeded to institute litigation seeking to remedy the situation by compelling certain amendments to the Federal Order. The United States Court of Appeals for the District of Columbia Circuit held that the plaintiff lacked adequate justiciable interest. *United Milk Producers of New Jersey* v. *Benson*, 225 F. 2d 527 (1955).

In the same year (1955) the United States Secretary of Agriculture, and the Director of the Office of Milk Industry, Department of Agriculture of the State of New Jersey, entered into a Memorandum of Understanding similar to that entered into earlier between the Secretary and the Commissioner of Agriculture and Markets of the State of New York. Also notices of joint and concurrent hearings were issued by the

Secretary, the Director, and the Commissioner, on proposals to extend the marketing area under the Federal and New York State Orders, and all provisions of these Orders, including the compensatory payment provision, to northern New Jersey and additional areas in New York State. (Compare New York State Notices, see Supplement B this brief.)

Following the hearings the Federal and New York State Orders were amended identically to provide for such extensions, and the Director of the Office of Milk Industry, State of New Jersey, issued a New Jersey State Order identical in all material respects with the amended Federal and New York Orders. Thereby, a single, joint program for the marketing of milk in the New York-New Jersey milk marketing area was established by the United States and the two States, and milk marketed in the marketing area from peripheral plants not fully regulated by the three Orders became subject to the compensatory payment provisions of those Orders.

The problem of dealing with the peripheral handling of milk in the regulated areas is not limited to Lehigh and Sunerest. The boundaries of the marketing area reach from Southern New Jersey into Northern New York. (See map inserted in this brief.) Along the periphery of this marketing area there are numerous milk dealers either with limited sales within the area or having the potential of such sales. The integrity of the regulatory program depends upon the effectiveness of the regulation of these fringe dealers, and the State and Federal regulatory authorities were faced with the decision whether to impose full regulation upon such dealers or create a less stringent device for preserving the effectiveness of the milk regulation.

The Federal Government could have taken over the whole field of regulation of milk approved for, shipped to, received in, or distributed in the New York-New Jersey milk marketing area. Cf., *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Titusville Dairy Products Co.* v. *Brannan*, 176 F. 2d 332 (C.A. 3, 1949), cert. den. 338 U.S. 905; *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346, 351 (1939). The Federal Government chose not to do this. As to this marketing area, the States having acted, the Federal Government contents itself with the role of complementing concurrent State Orders. The policy of the Federal Act "may be effectuated by a state program either with or without the promulgation of a Federal program by order of the Secretary". *Parker* v. *Brown*, 317 U.S. 341, 354 (1943). It lies within the discretion of the Secretary to determine whether, when a state has a program, a Federal complementary order will be issued to make that program effective.*

What Lehigh and Sunerest are actually contending is that § 8c(5)(A) of the Act should be construed so as to bar the Federal Government from complementing in its Order the compensatory payment provisions of the State Orders. There is no claim that the statutory authority of the State officials is inadequate for inclusion of the compensatory payment provisions in their State Orders.

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* There are other instances where Federal Acts serve the function of preventing supersedure and preserving state control in areas where State and Federal law may be overlapping or be concurrent. *Rice* v. *Chicago Board of Trade*, 331 U.S. 247 (1947); *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946); *Whitfield* v. *Ohio*, 297 U.S. 431 (1936); *Panhandle Eastern Pipe Line Co.*, 332 U.S. 507, 521 (1947).

The historical setting of the Act, the necessity for dealing with peripheral handlers shipping from without a State into a marketing area within the State, and the Congressional objective to further and complement State regulation, indicate that the Act should be liberally construed to make it possible for the Federal Government to complement and make fully effective State Orders. State regulation alone cannot be fully effective if the Federal Government is powerless to complement the State Orders by dealing with peripheral handlers shipping into a State from outside the State. If this Court were to reverse the Court of Appeals for the Third Circuit, the effect would be to bar the Federal Government from exercising its power to complement the compensatory payment provisions of the New York and New Jersey Orders, and to render ineffective the entire scheme of joint Federal-State milk regulation.

II. SECTION 8c(7)(D) OF THE ACT VESTS IN THE SECRETARY OF AGRICULTURE AUTHORITY TO PRESCRIBE THE COMPENSATORY PAYMENT PROVISION OF THE FEDERAL ORDER.

The conflict between the decision of the Court of Appeals below and the decision of the Court of Appeals for the Second Circuit in *Kass* v. *Brannan*, 196 F. 2d 791 (1952), cert. den. 344 U.S. 891, centers on the scope of the power conferred upon the Secretary of Agriculture by § 8c(7)(D) of the Act, providing that a milk marketing order shall include terms and conditions—

> "(D) Incidental to and not inconsistent with the terms and conditions specified in subsections (5), (6) and (7) and necessary to effectuate the other provisions of such order."

The scope of the Secretary's authority under this section must be determined in light of the objectives of

the Act.* Congress, so far as here relevant, designed the Act to establish and maintain for farmers stated price levels (Act, § 2(1) and § 8c(18)) and orderly marketing conditions (Act, § 2(4)). The Act is a farmers' Act. It was not designed to create competitive advantages for non-pool handlers. As to milk the objectives of the Act are to be accomplished through programs of minimum class pricing for each class use of pool milk (Act, § 8c(5)(A)) and the payment of a uniform blended pool price to producers irrespective of the class use made of a particular farmer's pool milk (Act, § 8c(5)(B)). The accomplishment of minimum pricing and payment of uniform prices to producers is effected through pooling all fully regulated milk (Act, § 8c(5)(C)). The programs are to be embodied in milk orders for marketing areas established on a regional basis (Act, § 8c(11)(A)).

Pursuant to the Act, the Federal Order provides for a classification of milk according to its various uses (7 C.F.R. § 927.37) and establishes minimum prices for each use classification (7 C.F.R. § 927.40). The Order further provides for a producer settlement fund, commonly referred to as the "equalization fund" (7 C.F.R. § 927.75). The equalization fund is the heart of the regulatory scheme. Through the mechanism of the fund all regulated milk is pooled and the uniform blended pool price determined and paid as required by § 8c(5)(B)(ii) of the Act. The legality of the equalization fund was considered and upheld by this Court in *United States* v. *Rock Royal Co-Operative, Inc., et al.*, 307 U.S. 533 (1939). The importance of the equaliza-

* For a summary and discussion of the provisions of the Act concerning milk regulation, see *Brooks, The Pricing of Milk under Federal Marketing Orders*, 26 George Washington Law Review 181.

tion fund to the objectives of the Act was described by the Court (p. 572) as follows:

> "* * * The pool is only a device reasonably adapted to allow regulation of the interstate market upon terms which minimize the results of the restrictions. It is ancillary to the price regulation designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing. * * *"

For reasons given below, compensatory payments are essential to the equalization fund as approved by this Court and the maintenance of minimum prices contemplated by § 8c(5)(A) of the Act. The Judicial Officer of the Department of Agriculture in his decisions on the validity of the compensatory payment provision of the Federal Order and the District Court on review of those decisions both found that the compensatory payment provision is incidental to, and necessary to effectuate, the other terms of the Order. R. 226a-228a. The Court of Appeals agreed with the conclusion of the District Court on this point. R. 906. The conflict with the *Kass* decision is on the specific issue under § 8c(7)(D) of whether or not the compensatory payment provisions of the Order are "inconsistent with" the requirement of § 8c(5)(A) of the Act that minimum prices be "uniform as to all handlers".

A. The Application of § 8c(5)(A) Relating to Uniform Minimum Prices Is Controlled By § 8c(11)(A) Relating to Regional Marketing Areas. Section 8c(5)(A) Does Not Apply to Non-Pool Milk.

Section 8c(11)(A) of the Act requires that all marketing orders be issued on the basis of "regional production areas or regional marketing areas, or both".* All Federal milk marketing orders are on a regional marketing area basis. In the Federal Order here under consideration the marketing area is that region defined in the Order as the New York-New Jersey milk marketing area.

Upon establishing a regional marketing area there must, under the Act, be created a milk pool for that area. Milk in the pool is "pool milk" which is subject to the uniform minimum class price requirements of § 8c(5)(A) of the Act. With respect to that milk the producers receive the uniform blended pool price. It is fully equalized or "fully regulated" milk. Milk outside the pool is "non-pool milk" with respect to which uniform minimum class prices are not paid by handlers into the equalization fund, nor uniform blended pool prices paid by handlers to the producers. Non-pool milk is not fully equalized or regulated but, when shipped into the marketing area, "partially regulated" through the compensatory payments.

It is important that there be cleared up certain misunderstandings as to what the uniform minimum price provision in § 8c(5)(A) actually provides. Misunderstanding with respect to the provision is apparent in the opinion of the court in the *Kass* case.

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* In debating the legislation leading to the Act Senator Smith, Chairman of the Senate Committee on Agriculture and Forestry, unequivocally stated that "It does establish regions and regional prices." (79 Cong. Rec. 11299)

Milk is classified under each order according to how it is used. Under the present Federal Order, milk used strictly for fluid consumption, is Class I;* cream consumed in New York City and in neighboring counties in New York State, is Class II; all remaining uses, such as for the manufacture of butter, cheese and ice cream, are designated Class III. 7 C.F.R. § 927.37. A minimum price is established for each Class, Class I having the highest price, Class III the lowest. 7 C.F.R. § 927.40. Producers benefit directly in relation to the proportion of order pool milk that is sold as Class I.

The uniform minimum price for each class of milk in the milk pool is not an amount paid *to* producers of milk. It is an amount paid *for* milk of producers. It is paid not to them but to the equalization fund. It is paid in the sense that the pool handler accounts to the equalization fund for the uniform minimum price for each class use of milk that he sells. What the handler pays to the producer is the uniform blended pool price dealt with in § 8c(5)(B), not § 8c(5)(A). Whether a handler ever actually pays any money into the equalization fund, or on the contrary withdraws money from that fund, depends on whether the total of the uniform minimum class prices accounted for by him to the equalization fund is greater or less than the total of the uniform blended pool prices to be paid by him to producers.

In order to provide for a regional marketing area and its milk pool, the Secretary must draw some line of demarcation. He must determine what milk from

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* The Federal Order provides for two classes of fluid milk--Class I-A and Class I-B. The distinction between the two is not important here and, for simplicity, milk for fluid consumption is referred to as Class I.

what producers is to be within the pool and subject to full regulation, and, conversely, what milk from what producers is to be without the pool and so not subject to full regulation. Such determinations are made by the Secretary in his Order.

In the present Order the Secretary has made uniform minimum prices payable with respect to "milk received . . . from producers". 7 C.F.R. § 927.40. "Producer" is defined as "any dairy farmer whose milk is delivered from farm to a pool plant". 7 C.F.R. § 927.6. It is only for such milk that a handler has to account to the equalization fund at uniform minimum prices. Milk received from "dairy farmers" who are not "producers" as defined does not go to a pool plant and is not under the Order subject to the uniform minimum price requirement. By these Order provisions the Secretary has exercised his discretion as to what producers' milk is to be accounted for by handlers at the uniform minimum prices for the marketing area pool.

The validity of the Secretary's definitions and the necessity for them was recognized by the Court of Appeals below. The Court said (R. 905):

> "... This establishment of the Act on a regional marketing basis necessitates differentiation between pool and non-pool handlers. The Secretary of Agriculture following the letter and spirit of the statute has implemented this concept. He has conducted hearings and investigations to determine the need in certain regions for Milk Marketing Orders, and where called for has promulgated them. The pool handlers under those Orders are subject to full regulation. They must report to the Market Administrator in the region, must pay the uniform blend-price to producers and must ac-

count to the Producers Settlement Fund for their actual utilization of the Milk. The non-pool handlers are not subject to full regulation, are not required to pay the uniform blend price to their producers and do not have to account to the Producers Settlement Fund for their utilization of the Milk. Absent the compensatory payments, they are unfettered as to price, market and amount of distribution." [footnote omitted]

B. The Purpose of the Compensatory Payment is to Maintain the Effectiveness of Minimum Class Pricing and Equalization.

The problem which necessitates the compensatory payment provisions of the Federal Order is inherent in milk regulation on the basis of defined marketing areas and a marketwide pool. It is obvious, in light of modern transportation and refrigeration facilities, that regardless of where the Secretary fixes the boundaries of the marketing area and defines the milk in the pool, there will be sales of non-pool milk within the defined area. As the Secretary of Agriculture stated (18 F.R. 8447)*:

"... If that milk which is available and eligible for sale in the marketing area from farmers who are not producers and which consequently is unpriced and unpooled under the order is not regulated in some manner, however, the minimum class pricing and equalization provisions of the order would be rendered ineffective. In the absence of some suitable form of regulation of such unpriced milk there is always an artificial economic incentive for milk from non-producer sources to enter the marketing area and displace milk from producers. . . . The exclusion of such milk from the

* 44 USC § 307 states that "The contents of the Federal Register shall be judicially noticed".

> marketing area is not authorized or desirable. The only alternative method or device which has been suggested or proposed for dealing with the situation is to impose a suitable charge on such unpriced milk in an amount sufficient to neutralize, compensate for and eliminate the artificial economic advantage for non-pool milk which necessarily is created by the classified pricing and pooling of pool milk under the order."

When non-pool milk is sold as fluid milk in the marketing area, it is used as Class I. The Secretary found (18 F.R. 8450) that—

> "Non-pool milk so utilized would displace and force into Class III an equivalent amount of producer milk, thus precluding distribution of the returns from sales in the marketing area to those producers relied upon to produce an adequate supply of milk and cream for use in the marketing area."

The situation is as follows:

When pool milk is sold as Class I fluid milk the handler accounts to the equalization fund at Class I prices. When non-pool milk is sold as fluid milk in the marketing area, it should also command the Class I price. Further, it displaces an equal amount of Class I milk of pool producers. The displaced milk is forced into the surplus Class III category. The handler accounts for it to the equalization fund at the lower Class III price.

The obvious effect of this displacement of pool milk is to reduce the proportion of higher priced Class I milk and increase proportion of lower priced Class III milk for which pool handlers account to the equalization fund. The equalization fund thus loses the differ-

ence between the Class I price and the Class III price. It follows that unless the pool is compensated for this displacement, the uniform blended pool price of all of the milk in the pool will be reduced and the producers who regularly supply the marketing area will bear the loss.

The pool's loss becomes the non-pool handler's gain. The displacing milk of the non-pool handler is not accounted for by him to the equalization fund at any price and he retains the difference between the Class I price and the Class III price. By selling non-pool milk at the Class I price, instead of putting it in low return surplus utilization, the non-pool handler makes it profitable for a farmer not to pool his milk and to do so at the expense of pool producers. Were it not for the compensatory payment the non-pool handler would keep all of the difference between the Class I and Class III prices. He would be free to use it to compete with pool handlers in attracting the patronage of producers, or as additional profit for himself, or in part both. He would thus have all the advantages of selling in the marketing area and yet he and his producers would bear none of the burden of surplus milk. By requiring the non-pool handler to make compensatory payments to the equalization fund the Order offsets the adverse effect on pool producers. Without the compensatory payment the whole plan of minimum class prices and equalization would be rendered ineffective.

In spite of the fact that in the instant case the Court of Appeals and the District Court reached opposite conclusions on the validity of the compensatory payment provisions of the Federal Order, there was no disagreement between them with respect to the need for compensatory payments to protect the equalization

fund and the uniform blended pool price to producers. The Court of Appeals, in rejecting the theory of the *Kass* case which Lehigh and Suncrest urged upon it, described compensatory payments (R. 903) as—

> ". . . designed to compensate the pool for the loss of the Class I fluid milk utilization and they in turn protect the uniform blend price in the marketing area. We cannot, as urged by Lehigh and Suncrest, reasonably impute to Congress a policy in one section of the Act that would directly conflict with the comprehensive regulatory undertaking of the complete Act as conceived by Congress." [footnote omitted]

When the case was before the District Court below, it described the sale of non-pool milk in the marketing area by Lehigh and Suncrest and others as a "fundamental threat to the regulatory scheme" contemplated by the Order. The Court stated (R. 215a):

> ". . . Thus, if non-regulated milk handlers (such as plaintiffs) are allowed to sell their milk in fluid form in the regulated area, they theoretically displace an equal volume of fluid milk sales which would ordinarily be made by fully regulated members. This automatically decreases the uniform unit price paid to all regular Order No. 27 producers for raw milk in the market area, since fluid milk sales produce the highest unit return of all classes of sales. Therefore *all* of the pool producers who regularly supply the Order No. 27 area feel this loss. If such sales become substantial enough they could disrupt the basic plan of regulation. At any rate they admittedly have a harmful effect upon every fully regulated producer under Order No. 27. . . ."

See also *Lawson Milk Co.* v. *Benson*, 187 F. Supp. 66 (N.D. Ohio, 1960), on appeal to the United States

Court of Appeals for the Sixth Circuit. In discussing the purpose of compensatory payments, the Court stated (p. 72):

> ". . . Fluid milk sold in the regulated area by non-pool handlers displaces fluid milk sales that otherwise would have been made by pool handlers, causing the latter to use more of their milk for manufacturing purposes (Class III), thus reducing the uniform blend price to the producers. The prospect of such results constituted a real threat to the integrity of the basic regulatory plan. . . ."

In *United States* v. *Rock Royal Co-Operative, Inc., et al.*, 307 U.S. 533 (1939), this Court recognized that "considerable flexibility" is provided by § 8c(7)(D) of the Act and it gives opportunity "to include provisions auxiliary to those definitely specified". (p. 575) We submit that the compensatory payment is certainly an "auxiliary" to the fund; the payment is essential if the equalization fund is to operate in the manner contemplated by this Court in the *Rock Royal* case. It is clear that the Secretary has the power to regulate fully all milk produced for the marketing area. *Titusville Dairy Products Co.* v. *Brannan*, 176 F. 2d 332 (C.A. 3, 1949), cert. den. 338 U.S. 905. By partial regulation of non-pool milk through the device of compensatory payments, the Secretary has found an alternative to full regulation. Rather than constituting an obstruction to interstate commerce or a penalty on outside milk as Lehigh and Suncrest claim (Br. pp. 47-50), the compensatory payment device permits outside milk to come into the marketing area without disrupting the basic plan of milk regulation contemplated by the Act. The compensatory payment provisions of the Federal Order permit the flow of non-pool milk into the marketing area without the burden of full regulation and yet

afford protection to the producers who regularly supply the marketing area and who regularly carry the burden of surplus milk. The authority of the Secretary to provide such payments comes squarely within the scope of §8c(7)(D) as construed by this Court.

C. It Is Not the Purpose of the Compensatory Payment to Equalize Costs Between Handlers of Pool Milk and Handlers of Non-Pool Milk.

Lehigh and Sunerest contend that to be valid the imposition of compensatory payments must result in uniform prices or costs to both pool and non-pool handlers. Br., p. 34. They argue that the minimum prices "payable" by all handlers (i.e., their acquisition costs) must be uniform and that the provisions of the Federal Order are invalid because the price non-pool handlers pay for their milk, plus the amount of the compensatory payment, exceeds the prices the pool handlers pay for their milk. Br., pp. 35-38.

The Petitioners' argument rests entirely upon the erroneous concept of the purpose of compensatory payments as announced in *Kass* v. *Brannan*, 196 F.2d 791 (C.A. 2, 1952). In the *Kass* case (p. 796) the Court held (Judge Learned Hand dissenting) that the compensatory payment is a "part of" the uniform minimum price to be fixed under §8c(5)(A) of the Act. Further, the Court held that the price of non-pool milk (actually in the *Kass* case, milk products, cream and condensed milk) to the handler is composed of two elements: (1) the initial cost, i.e., the amount paid by the handler to the seller, and (2) the amount of the compensatory payment or "penalty", as the Court called it. Since the compensatory payment was based on the difference between the order

price for fluid milk and its value as surplus milk, and not on the difference between the order price for fluid milk and the actual initial cost to Kass, the Court concluded that the handler of non-pool milk had a total cost greater than the class price at which the handler of pool milk accounted to the equalization fund. That difference, the Court held, effected a discrimination barred by the uniform minimum price requirement of § 8c (5)(A) of the Act. It concluded that the compensatory payment provision of the order cannot be justified under § 8c(7)(D) of the Act.*

It is not the purpose of the compensatory payment to equalize costs between handlers of pool milk and handlers of non-pool milk for the folowing reasons:

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* The Court of Appeals for the Second Circuit is presently considering the validity of the compensatory payment provisions of Federal Milk Marketing Order No. 96 for the Springfield, Massachusetts, milk marketing area which are comparable to the provisions of the Order under review here. *Knudsen Bros. Dairy Inc.* v. *Benson*, Case No. 26698. The case is on appeal from the United States District Court for Connecticut and has been argued before the Court of Appeals. The District Court struck down the provisions of Order No. 96 on the authority of the *Kass* decision.

In *Lawson Milk Co.* v. *Benson*, 187 F. Supp. 66 (N.D. Ohio 1960), the Court refused to follow the reasoning of the Second Circuit. That case is on appeal to the Court of Appeals for the Sixth Circuit where a decision has been postponed pending the outcome of the instant case. The reluctance to follow the *Kass* doctrine is also apparent from the decision of the District Court in the case now under review. While the Court followed the *Kass* theory, it stated that it "might have reached a contrary result if initially called upon to interpret section 8c(5)". R. 224a.

(1) *The uniform minimum price provision of § 8c (5)(A) of the Act does not apply to non-pool milk and, therefore, a compensatory payment with respect to non-pool milk is not part of the uniform minimum price.*

Lehigh and Suncrest are not handlers of pool milk and they do not account to the equalization fund at any price for their milk. Neither are Lehigh and Suncrest required to pay for their milk at not less than the uniform blended pool price. Since the minimum pricing provisions of the Federal Order have no application to Lehigh and Suncrest, the requirement that they make compensatory payments into the equalization fund cannot be inconsistent with such Order provisions. Obviously, there can be no discrimination between pool and non-pool handlers under §8c(5)(A) under these circumstances.

The Court of Appeals below correctly interpreted §8c(5)(A) when it stated in its opinion as follows (R. 904):

> "We are also convinced that, in the light of the structure and avowed purpose of the Act, Section 8c(5)(A), has no application to non-pool handlers. Lehigh and Suncrest would have it that the Act makes no distinction between pool and non-pool handlers and that therefore the provision of Section 8c(5)(A) which states: 'Such price shall be uniform as to all handlers,' guarantees them a cost equal to that of pool handlers But there is not the slighest indication that Congress used the language of Section 8c(5)(A), with the thought of providing for equalized costs between pool and non-pool handlers and thereby stifling the effectiveness of the whole plan . . ." [Footnote omitted]

(2) *A handler's initial cost, i.e., the amount paid the seller, is not a factor in prescribing uniform minimum prices.*

Even if the uniform minimum price requirement did apply to non-pool milk, the handler's initial cost is irrelevant in computing that price. Uniform minimum class prices do not fix the initial cost to the handler, i.e., what he pays for his milk, but only the amount paid or accounted for by handlers to the equalization fund. If uniform minimum prices were to represent handlers' costs, a minimum class price would rarely be uniform. It would vary with each handler for the Act does not prohibit paying more than the minimum class price. Handlers frequently pay a premium for their milk. This is true whether the handler's milk is pooled or is not pooled. In case of premiums the handler, if his milk is pooled, still pays or accounts to the equalization fund for his milk at the uniform minimum class prices, but pays the producer the uniform blended pool price plus the premium. No one would seriously contend that the requirement of uniform minimum prices is not met in such a situation. If the handler's milk is not pooled, he does not account for it to the equalization fund at the uniform minimum class prices and does not pay the dairy farmer the uniform blended pool price, but pays whatever price the handler and the dairy farmer agree on. It is apparent that in the case of a marketing area pool the administration of uniform minimum prices based on handlers' costs would be impossible.

Furthermore, if non-pool handlers' costs were to be used as a basis for determination of compensatory payments, it would permit such handlers completely to avoid compensatory payments by paying to their farmers additional sums representing amounts which other-

wise would be paid into the equalization fund. This would usually result in the lowering of the uniform blended pool price and in the non-pool dairy farmers receiving prices for their milk considerably in excess of the uniform blended pool price to producers. Such result would create disorderly marketing contrary to the declared policy of §1 of the Act.

(3) *A compensatory payment for the purpose of equalizing costs between pool and non-pool handlers would be beyond the statutory authority of the Secretary.*

Section 8c(5)(A) of the Act makes no mention of equalizing handlers' costs. It specifies uniform minimum class prices at which pool handlers account to the pool for milk purchased from producers which, in turn, determine the uniform blended pool price paid by pool handlers to producers. Since the non-pool handler, such as Lehigh or Sunerest, does not have to account to the pool at uniform class prices nor pay for his milk the uniform blended pool price, his uncontrolled cost price is unrelated to the controlled uniform blended pool price. Lehigh and Sunerest seek to make applicable to them the requirement for uniform minimum class prices to which they are not subject and which is not a basis for arriving at the price they pay their farmers.

The Act does not require the equalizing even of producers' costs. Guernsey milk was found by a District Court to have a greater cost of production than average milk. It was urged that the uniform blended pool price paid to producers under § 8c(5)(B) of the Act should recognize this by a differential for Guernsey milk. The Court of Appeals for the Second Circuit held that "producer costs or marketability are not in themselves factors to influence milk prices". *New*

York State Guernsey Breeders' Co-Op., Inc. v. *Wickard,* 141 F.2d 805 (C.A. 2, 1944). It is implicit in that Court's opinion that farmers' costs are not a part of the minimum blended pool prices paid to pool producers even though such prices—as distinguished from costs—are required to be "uniform" under §8c(5)(B).* Correspondingly, equalizing handlers' costs is no part of the minimum class prices which are required to be "uniform" under §8c(5)(A).

For the foregoing reasons the Court in the *Kass* case misconstrued the meaning of §8c(5)(A) of the Act and as a result reached erroneous conclusions with respect to the purpose of the compensatory payment and the authority of the Secretary of Agriculture under §8c(7)(D) of the Act.

The Court of Appeals for the Third Circuit correctly refused to follow the *Kass* decision in the instant case. Its reasoning in rejecting the *Kass* theory is expressed as follows (R. 902):

> "The Kass opinion assumes that the minimum class price provision of Section 8c(5)(A) is designed to equalize the actual costs of milk to all handlers distributing milk in the marketing area. And Lehigh and Suncrest assert in their brief:
>
> "'The result sought to be achieved by Congress in this section [8c(5)(A)] was that through the device of class prices *all handlers' costs for milk utilized in the marketing area should be uniform* so that no one group of handlers could enjoy an unfair advantage or suffer an unfair disadvantage.' [Emphasis supplied.]

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* Recognition of differences in producers' costs was urged only under the "grade or quality" exception to the uniform blended pool price (Act, § 8c(5)(B)). The Court found even this exception inapplicable (p. 810).

This interpretation misconceives the plain language of the section and suggests a policy not contemplated by Congress.

"Section 8c(5)(A) of the Act makes no reference to equalizing either fully regulated or partially regulated handlers' costs. It provides solely for uniform minimum class prices for which the pool handlers must account to the Producers Settlement Fund. Nor does it take account of the initial cost of milk to handlers. As has been recognized by the Supreme Court, Section 8c(5)(A) does not prevent the pool-handler from paying a premium to producers for milk over and above the uniform blend price. However, his accountability to the Producers Settlement Fund would still be measured by the use class prices fixed by the Market Administrator under Section 8c(5)(A). Stark v. Wickard, 321 U.S. 288, 303 (1944). These latter prices are based on the use value of the milk. Neither fully regulated nor partially regulated handlers' initial costs are involved. Lawson Milk Company v. Benson, 187 F.Supp. 66, 73 (N.D. Ohio 1960)." [Footnote omitted]

D. The Amount of the Compensatory Payment Corresponds to Its Purpose.

The Secretary found that the amount of the compensatory payment should be computed on the basis of the difference in value of fluid and surplus milk and that the amount should be graduated in accordance with the supply of fluid milk available for the marketing area.

The Secretary's findings and conclusion in connection with the 1953 amendments to the Order are set forth at length in the Federal Register (18 F.R. 8445-8451). Without more, the findings show that the amount of compensatory payment is a matter for the Secretary's informed discretion. The Judicial Officer,

the District Court below, and the Court of Appeals for the Third Circuit, each found that the compensatory payment provision is supported by the evidence of record.

The amount of the compensatory payment set by the Secretary is reasonable and corresponds to its purpose of compensating the equalization fund for the loss due to displacement of pool milk by non-pool fluid milk sales in the marketing area. We have already shown that when non-pool milk is sold as Class I fluid milk in the marketing area an equal amount of pool milk is forced into the lower Class III utilization, and that since the pool handler's obligation to the equalization fund is determined on the basis of the Class III minimum price, the equalization fund loses the difference between the Class I and Class III prices. We have also shown that since the non-pool handler is not required to account to the equalization fund, he is, in the absence of a compensatory payment, at a competitive advantage over the pool handler to the extent of the difference between the Class I and Class III prices. Under these circumstances, the measure of the payment is quite logically based upon the difference between the Class I price at which the displaced milk would have been sold, but for the displacement, and the Class III price at which it is sold. By measuring the amount of the compensatory payment in this manner the Federal Order compensates the equalization fund for the displacement. At the same time it removes the competitive advantage which the non-pool handler would otherwise have over the pool handler or his producers would have over pool producers.

While the compensatory payment, in maintaining the effectiveness of the pricing and pooling plan, brings about substantial equity between pool and non-pool handlers (R. 752a), it is not designed to equalize handlers' costs and the amount of the payment should not be based on handlers' costs. In fact, as pointed out by the Court of Appeals below, to measure compensatory payment by using the *Kass* formula of equalized costs would be "repugnant to the *express* purpose set forth in the Act itself" and would "impair the integrity of the regional marketing scheme, since the compensatory payments would bear no relation to the loss of Class I fluid milk utilization in the marketing area". In contrast, the measure of the compensatory payment, as provided for in the Order, complements the regional marketing idea. R. 903.

The reasonableness of the amount of the compensatory payment is evident from the fact that the payment is required to be made only when Class I pool milk is displaced by non-pool milk. In periods when there is a shortage of Class I milk in the pool, with the result that the sale in the marketing area of non-pool milk as fluid milk does not displace pool milk, the compensatory payment is not required.* The equalization fund is compensated only when it does suffer loss from displacement of Class I pool milk.

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* Thus, 7 C.F.R. § 927.83 states in the first proviso as follows:

"That for any month in which the volume of Class III milk used in the computation of the uniform price is less than 15% of the combined volume of Class I-A and Class II milk used in such computation, the [compensatory] payments set forth in this section shall not be required."

E. The Secretary Has Not Acted Arbitrarily in the Regulation of Non-Pool Milk Sold in the Marketing Area.

The history of the Federal Order demonstrates that the Secretary has been reasonable and conscientious in the exercise of his authority under § 8c(11)(A) of the Act to prescribe milk regulation on a regional basis. In the light of experience, the determinations of the Secretary as to pool and non-pool milk have varied over the life of the Order:

(1) *Milk Subject To Pooling.*—(a) Under the Federal Order as originally promulgated in 1938, all milk delivered by producers to a plant approved by a health authority of the marketing area was required to be accounted for by handlers to the equalization fund at the uniform minimum class prices, and producers of that milk were paid the uniform blended pool price. An exception was made of milk from an approved plant that was marketed outside the marketing area. This milk was unpriced and so on it no payments at the uniform minimum class prices were accounted for to the equalization fund. This system was held valid by this Court in *United States* v. *Rock Royal Co-Operative, Inc., et al.,* 307 U.S. 533 (1939).

(b) In 1941 the excepted milk was partially priced, instead of unpriced, and the handler had to account for it to the equalization fund at the partial prices but not at the uniform minimum class prices. The system as so modified was held valid in *Titusville Dairy Products Co.* v. *Brannan,* 176 F.2d 332 (C.A. 3, 1949), cert. den. 338 U.S. 905.

(c) In 1945 a new concept of pool and non-pool plants was developed. Designation as a pool plant was based on shipment of, or ability and willingness to ship, fluid milk into the marketing area. *Kass* v.

Brannan, 196 F.2d 791 (C A. 2, 1952). This pool plant basis of distinguishing between pool and non-pool milk is still in effect. Only pool plant milk is in the milk pool and accounted for at the uniform minimum class prices. The validity of this system of differentiation is not at issue in this case, nor was it in the *Kass* case.

(2) *Milk Not Subject To Pooling.*—(a) Under the health-authority-approved-plant delineation, milk from non-approved plants was barred from the marketing area by health authorities and so was not pooled.

(b) Under the pool plant delineation milk from non-pool plants is not pooled but neither is it barred from the marketing area. It is permitted access to that area. However, a compensatory payment has to be made with respect to it. The payment is based on the difference between the fluid value and the surplus value of the milk. 7 C.F.R., 1945 Supp., §§ 927.8(e) and 927.9(h). This provision was held invalid in the *Kass* case.

(c) In 1953 extensive hearings were held by the Secretary and extensive findings and conclusions made by him supporting the compensatory payment provisions. 18 F.R. 8444 ff. Also, under the 1953 amendments the amount of the compensatory payment is reduced when the varying seasonal supply of fluid milk for the marketing area becomes short.

(d) Under the amendment effective August 1, 1957, extending the marketing area to northern New Jersey and upper New York State, all milk from non-pool plants was subject to compensatory payments, as theretofore, when shipped into the marketing area. However, a plant otherwise a non-pool plant and having 55 per cent or more of its milk classified as fluid milk, had the option of being designated as a pool plant and

thereby subject to full regulation rather that to compensatory payments.

(e) Under the amendment to the Order effective September 1, 1958, (7 C.F.R. §927.29) fringe plants distributing in part in the marketing area, 55 percent or more of whose milk is classified as fluid milk, were made pool plants and so not subject to compensatory payments but to full regulation. A handler could elect, however, to have his pool plant designated a non-pool plant. 23 F.R. 6053. In the event of such election, but not otherwise, the handler becomes subject to the compensatory payments. Sunerest and Lehigh have for each month since September 1, 1958, elected compensatory payments in lieu of full regulation as pool plants (R. 893, 895).

Obviously the Secretary has not been inflexible or failed to give exhaustive consideration to the problem of milk subject to pooling (full regulation) and that not subject to pooling (partial regulation). The problem of drawing such a line cannot be avoided since, as required by the Act, milk orders are required to be a regional area basis, and a pool must be established for that area.

Congress was fully aware of the system of partial regulation adopted by the Secretary and made no change in the Act to outlaw it. Following the decision in the *Kass* case, Congress conducted a study of the problems of the milk industry during the course of which the Secretary's use of compensatory payments in Federal milk marketing orders was fully explained. *Study of the Dairy Industry,* Hearings Before The Subcommittee On Dairy Products Of The Committee On Agriculture, House of Representatives, 84th Con-

gress, 1st Sess., pp. 1-31. The failure of Congress to enact legislation "is at least some evidence of Congressional approval of the administrative interpretation". *Laycock* v. *Kenney*, 270 F. 2d 580, 589 (C.A. 9, 1959). Such a long-continued administrative interpretation must be given great weight. *United States* v. *Bergh*, 352 U.S. 40 (1956).

F. The Disposition of a Compensatory Payment Conforms to Its Purpose.

Lehigh and Sunerest argue that the compensatory payment provisions of the Federal Order are contrary to the plain Congressional intent because non-pool handlers are required to contribute a "gratuity" to the equalization fund measured by the difference between the Class III and the Class I minimum prices established for pool milk. They argue that such disposition goes to the benefit of producers who had nothing to do with production of the milk. Br., p. 29.

Compensatory payments can hardly be characterized as "gratuities". The Record shows that the Judicial Officer, the District Court and the Court of Appeals below each found that the payments are necessary to the regulatory scheme. R. 226a-228a, 906. It has also been shown that the purpose of requiring a compensatory payment when outside milk is sold in the marketing area is to maintain the minimum price structure required by the Act and to compensate the equalization fund for the displacement sale of Class I pool milk in the marketing area. It follows, therefore, that payment to the equalization fund is the only logical disposition to be made of compensatory payments. Unless Lehigh and Sunerest pay the compensatory

payment into the equalization fund they or their producers, or both, benefit at the expense of pool handlers and pool producers. On this point the Secretary found (18 F.R. 8450):

> "The fact that this displacement loss to the pool does occur whenever non-pool milk is used in Class I-A or II does, however, provide an additional reason for imposing some charge on the non-pool milk and clearly justifies the addition of such payments to the common pool as partial compensation for the displacement loss suffered by the pool. . . . A fundamental purpose of the order is to fix a schedule of prices for pool milk which will (1) insure that a sufficient and dependable supply of quality milk will be available for Class I-A and Class II needs of the market, and (2) be in the public interest. To the extent that such sales are displaced through the disposition of surplus milk from unpriced sources, producers lose income from sales in the market which they are expected to supply. Producers would not realize the income from the sale of their milk which the order is designed to provide at the class prices established. Such loss of income unless otherwise compensated for would necessitate higher class prices, at the ultimate expense of consumers. Otherwise, the maintenance of an adequate supply of milk for the market would be jeopardized. The addition of compensation payments to the producer settlement fund is an appropriate method of compensating, insofar as possible, producers relied upon to supply the market for a loss of income which they would otherwise incur . . ."

It is wholly appropriate for the compensatory payment to be paid into the equalization fund to compensate for the loss suffered by that fund through the

marketing of non-pool milk in the marketing area. By characterizing compensatory payments as "gratuities", Lehigh and Sunerest imply that they pay something into the equalization fund and receive nothing in exchange. The same complaint could be made by any pool handler whose percentage of fluid milk sales are so high that he must contribute to the equalization fund. If the argument were valid, such a handler could rightfully refuse to make payments into the equalization fund with respect to his fluid milk sales and thereby defeat the entire scheme of milk regulation. The argument of Lehigh and Sunerest conflicts with the basic concept of pooling milk sales to accomplish the payment of the minimum uniform blended pool price and the maintenance of stable marketing conditions sought by the Act.

The objection which Lehigh and Sunerest make to the disposition of the compensatory payments was considered by this Court in *United States* v. *Rock Royal Co-Operative, Inc., et al.*, 307 U.S. 533 (1939). There the constitutionality of the equalization fund was attacked. It was asserted that the pooling requirement of the Order was a deprivation of liberty and property in that it deprived the handler of the right to pay a producer at the minimum class price in accordance with the use of his particular milk and required the handler to distribute the difference between the minimum class price and the uniform blended pool price through the equalization fund to those producers whose milk was resold less advantageously. The Court rejected this argument (p. 572) holding that the pool is a reasonable device to minimize the results of restrictions and that it is designed to protect interstate commerce by smooth-

ing out the difficulties of the surplus and cut-throat competition.*

The Court's reasoning is equally applicable to the disposition of the compensatory payment. As already indicated, the compensatory payment is necessary and incidental to the pricing provisions of the Order. If Lehigh and Suncrest were allowed to pay the difference between the Class I and Class III prices to their producers rather than to the equalization pool and if this practice were extended to all non-pool handlers and then in fairness in turn to pool handlers selling fluid milk in the marketing area, it is obvious that the effectiveness of the pool, which the Supreme Court recognized as so necessary to the price regulatory scheme, would be jeopardized.

III. LEHIGH AND SUNCREST ARE ESTOPPED FROM CONTESTING THE VALIDITY OF THE PRESENT COMPENSATORY PAYMENT PROVISION.

Lehigh and Suncrest at all times here pertinent have had an election under the Federal, New York and New Jersey Orders as to whether their plants supplying milk to the marketing area should be pool or non-pool plants. If pool plants, they would be fully regulated under the Orders. All sales of milk, no matter where made, would become subject to the uniform minimum class price and equalization provisions of the Orders and the handlers would be required to pay the uniform blended pool price to the producers. If non-pool plants, they would be only partially regulated under the Or-

* Rock Royal Co-Operative, Inc., it should be noted, is represented by Mutual Federation of Independent Co-operatives, Inc., one of the *amici curiae* filing this brief. If Lehigh and Suncrest are allowed to prevail here, they will be permitted to do that which was denied Rock Royal Co-Operative, Inc., namely payment of amounts to their producers rather than into the equalization fund.

ders. The milk would not be subject to the uniform minimum class price, equalization, and uniform blended pool price provisions of the Orders. The handler would be free to retain the benefits of his outside sales and have only his sales within the marketing area regulated through compensatory payments. It becomes an economic choice for the handler, whether he would be better off financially through such limited partial regulation as is offered to him or to remain fully regulated.

Lehigh and Sunerest elected to have their plants treated as non-pool plants and to make the compensatory payments. Having done so, they may not contest the validity of the Order provisions for those payments. Lehigh and Sunerest contend that they had no "free option" and "no opportunity for free choice". Br., pp. 51, 52. Our position is that Lehigh and Sunerest were free as to the choice they might make and elected the status they determined was to their economic benefit.

During the period August 1, 1957, to September 1, 1958, the Orders provided that if at least 55% of the milk received at a non-pool plant was classified as fluid milk, then the handler could elect to have his plant become a pool plant. 7 C.F.R. §927.29(d). Thereby, compensatory payments could be avoided. During this period neither Lehigh nor Sunerest exercised the option to have their plants become pool plants but retained the status of non-pool plants. Because of the change in Lehigh's method of marketing in August 1957 (shortly before this litigation was instituted in the Department of Agriculture), Lehigh was not in a position to exercise the option of having its plants become pool plants. R. 831a-832a, 322a-326a.

Effective September 1, 1958, the pool plant election provision of the Federal Order was amended. The New York and New Jersey Orders were similarly amended. Since that date a plant is automatically a pool plant for any month if at least 55% of the milk received from producers at the plant during such month is classified as fluid milk. The handler, however, is given the option of electing to have the plant become a non-pool plant and to make the compensatory payments in lieu of full regulation. 7 C.F.R. § 927.29(d) as amended effective September 1, 1958. Lehigh and Sunerest so elected under the following circumstances:

The Act (§8d(1)) requires all handlers subject to a milk marketing order to make reports that the Secretary determines to be necessary to carry out the order and effectuate the policy of the Act. The Federal, New York and New Jersey Orders (7 C.F.R. §927.50) require all handlers to make a monthly Plant Report with respect to the milk received at their plants, whether the plants are pool or non-pool plants. Lehigh and Sunerest failed and refused to make these Reports. R. 190a. The District Court in its temporary injunction order, *pendente lite*, of October 4, 1957 (R. 192a) directed that Lehigh and Sunerest make all Reports required by the provisions of the Federal Order beginning August 1957. Lehigh and Sunerest thereupon made the required Reports. In September 1958 the monthly Plant Report prescribed by the Market Administrator for all handlers marketing milk in the marketing area, pursuant to the amendatory provisions of the Federal, New York and New Jersey Orders, contained an election provision. R. 893-896. In the Report under the heading "Method Of Election" it was then, and still is, provided that:

> "If the plant being reported meets the specifications of §927.29(d) it shall be a pool plant unless the following election is signed by the handler:
>
> " 'The undersigned handler hereby elects to have this plant not designated a pool plant and to make payments into the producer settlement fund as provided in §927.29(d)'."

For September 1958 and for each month thereafter Lehigh and Sunerest have affirmatively elected to have their plants treated as non-pool plants and to make the compensatory payments. It is true that the District Court directed that Lehigh and Sunerest file Plant Reports the same as all other handlers but there was no direction as to whether they should or should not elect to have their plants treated as non-pool plants.* Lehigh and Sunerest were not "involuntarily subjected" (Br., p. 51) to compensatory payments by the District Court Order.

Partial regulation is a privilege, not a "penalty" as asserted by Lehigh and Sunerest. If Lehigh and Sunerest had not elected for each month since September 1, 1958, to be non-pool plants, they would have remained pool plants and in a position of precise, identic equality with other handlers whose pool plants were fully regulated under the Federal Order. There is no

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* The amendatory provisions of the Federal Order effective September 1, 1958, permitting a handler affirmatively to elect to have his plants become non-pool plants, were adopted subsequent to the institution of these proceedings before the Judicial Officer of the Department of Agriculture and to the filing of the complaints and answers in the District Court. Lehigh and Sunerest, nevertheless, urge the invalidity of compensatory payments under the present provisions of the Order permitting them to elect non-pool plant status as well as under the former provisions of the Order. The District Court dealt with the present amended provision in its final opinion and held it invalid. R. 228a-229a.

question but that the Secretary in his Order may fully regulate such peripheral handlers as Sunerest and Lehigh. Full regulation, i.e., accounting by the handler to the equalization fund at the uniform minimum class prices for all milk received at a plant and payment by the handler of the uniform blended pool price to the producers of that milk,—has already been sustained. *Titusville Dairy Products Co.* v. *Brannan*, 176 F.2d 332 (C.A. 3, 1949), cert. den. 338 U.S. 905. See also, *United States* v. *Rock Royal Co-Operative, Inc., et al.*, 307 U.S. 533.

Lehigh and Sunerest seek to avoid all regulation. They seek to avoid full regulation, which is unquestionably valid, by electing the option of partial regulation through compensatory payments. They then, in turn, assert that such elected partial regulation is invalid. They may not be heard to make this assertion.

Lehigh and Sunerest are not entitled to have the courts pass on the validity of a provision that they find economically preferable and consequently have elected to accept. For example, one may not elect to come under an Act and then question its constitutional validity. *Booth Fisheries Co.* v. *Industrial Commission*, 271 U.S. 208, 210-11 (1926). If one uses an Act to gain advantages, he is estopped to question the validity of its vital conditions. *Fahey* v. *Mallonee*, 332 U.S. 245, 255-6 (1947); *J. H. Crain* v. *United States*, 104 Ct. Cls. 713, 738-9 (1945). The same principle applies where a regulation, order, or other administrative action is involved, rather than a statute. *Callanan Road Co.* v. *United States*, 345 U.S. 507, 513 (1953); *Commissioner of Internal Revenue* v. *National Lead Co.*, 230 F.2d 161 (C.A. 2, 1956), aff'd. on other grounds, *National Lead Co.* v. *Commissioner*, 352 U.S. 313 (1956). In

Varnell v. *Hillsborough Packing Co.*, 70 F.2d 435, 438 (C.A. 5, 1934), it was held that a handler who at his election signed a marketing agreement under the Act presently being considered could not obtain an injunction against enforcement of an order issued under the marketing agreement.

IV. IN THE EVENT THE PRESENT COMPENSATORY PAYMENT PROVISION IS HELD INVALID, LEHIGH AND SUNCREST WOULD BE SUBJECT TO FULL REGULATION UNDER THE ORDER COMMENCING SEPTEMBER 1, 1958.

The District Court in its opinion took the position that if the compensatory payment provision in effect prior to September 1, 1958, is invalid, then the present provision for full regulation, unless the option of non-pool plant status and compensatory payments is exercised, must also fall. The District Court concluded that Lehigh and Suncrest were "forced" to elect the present compensatory payment provision "since the economic burden of full regulation would be even greater". Nevertheless, the court conceded, citing the *Titusville* case, that the Secretary could enforce full regulation upon the handlers "by an appropriate order".

The present Order adopted after extensive hearings, findings, and conclusions (23 F.R. 6050) does appropriately and validly subject handlers to full regulation, including Lehigh and Suncrest, but gives Lehigh and Suncrest an alternative, not given all handlers, of making compensatory payments. If the present compensatory payment provision is held invalid, then the unquestionable valid provision for full regulation remains in effect and Lehigh and Suncrest remain subject to it. The District Court stated that "we do not feel" that the Secretary intended to enforce full regu-

lation upon a handler in such event, and "We flatly reject this conclusion". The court gave no reason for its view. Elsewhere in its opinion the court said (R. 227a-228a):

> "Sales of fluid milk in the area by non-regulated handlers impose a fundamental threat to this adequate amount of return. If unchecked, they could seriously disrupt the whole regulatory plan."

If the provision that Lehigh and Suncrest have elected to accept is held invalid, that does not carry with it the invalidity of the full regulation provision which the two handlers seek to avoid. Full regulation is valid and the provision for full regulation and the elective compensatory payment provision are separable. There is no basis for any conclusion that the Secretary intended that Lehigh and Suncrest should escape all regulation and to the detriment of producers whose milk is pooled, be placed in a preferred competitive position compared with other handlers marketing milk in the New York-New Jersey milk marketing area. To the contrary, the Secretary's serious concern about the destructive effect which the sale of non-pool milk would have in the marketing area without partial regulation makes it clear that the Secretary intended that if partial regulation through compensatory payments was not possible, then full regulation of fringe handlers would be imposed. Lehigh and Suncrest's attack has the objective of escaping all regulation.

V. THE ARGUMENT THAT THE COMPENSATORY PAYMENT PROVISIONS OF THE ORDER VIOLATE § 8c(5)(G) OF THE ACT IS NEITHER TIMELY NOR VALID.

Lehigh and Suncrest contend that the compensatory payment provisions of the Federal Order are in conflict with §8c(5)(G) of the Act and prohibit the flow of milk in interstate commerce. Br., pp. 47-50. The

argument presents an issue which was not considered and passed upon by the Court of Appeals, the District Court, or the Judicial Officer. Accordingly, Lehigh and Sunerest are precluded from having this issue reviewed by this Court. *McCullough* v. *Kammerer Corp., et al.* 323 U.S. 327 (1945); *De Sylva* v. *Ballentine*, 351 U.S. 570 (1956)

Assuming for the sake of argument that the issue is properly before this Court, it is respectfully submitted that the compensatory payment provisions of the Federal Order are not invalid under §8c(5)(G) of the Act.

Lehigh and Sunerest rest their argument upon the case of *Hood and Sons* v. *DuMond*, 336 U.S. 525 (1949), which they allege "dealt with an analogous situation". Br., p. 48. In the *DuMond* case this Court held that the action of the New York Commissioner of Agriculture and Markets in denying a license to the Hood Company to expand its facilities was in violation of the commerce clause of the Federal Constitution. That situation is not at all analogous to the circumstances here. In the *DuMond* case the regulation was the sole result of state action. Here the regulation is the result of a joint and concurrent action by the Secretary of Agriculture, the State of New York and the State of New Jersey. This difference is significant. Referring to the memorandum setting forth the principles of cooperation between the Federal and New York authorities (see Appendix A of the brief *amicus curiae* filed by the State of New York), the Court observed (p. 542):

> "But no federal approval or responsibility for the challenged features of this order appears in any of these provisions or arrangements. The

> 'memorandum of the principles of cooperation' relates only to marketing areas in New York, while the marketing area served by Hood is entirely outside of New York and is controlled by Federal Order No. 4, applicable to the greater Boston market. Federal Order No. 27 is applicable to the New York metropolitan market and it is as to this order that the State of New York is recognized by the memorandum as entitled to consultation. There is no such financial support as was given in *Parker* v. *Brown*, 317 U.S. 341."

The plain language of §8c(5)(G) of the Act differentiates between milk and milk products so far as the authority of the Secretary is concerned. With respect to milk the Secretary cannot "prohibit" the marketing in the marketing area of milk produced in any production area in the United States. So far as milk products are concerned, he cannot "in any manner limit" such marketing.

The legislative history of the Act shows that by the use of the word "prohibit" Congress did not intend to render the Secretary powerless to impose restrictions on fluid milk in interstate commerce. During the debate in the House of Representatives, Representative Andresen offered an amendment to add the following paragraph (G) to §8c(5):

> "(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit the marketing in that area of any milk or product thereof produced in any production area in the United States."

Representative Sauthoff then offered an amendment to Andresen's amendment which would have used the words "limit or tend to limit" in lieu of the word "prohibit". Sauthoff's amendment would have applied to

milk, as well as milk products. Congressman Jones, Chairman of the Agricultural Committee, objected to the Sauthoff amendment although he had no objection to Andresen's amendment. He stated his position as follows (79 Cong. Rec. 9572):

> "I am perfectly willing to adopt . . . [Andresen's amendment] . . . because that simply treats all areas alike for you could not prohibit someone from an outside area coming in so long as he complied with the conditions prescribed for that area; *but if you said that no restrictions or limitations could be required it would wreck the program, it would destroy every vestige of a program we have for milk.*" [Emphasis added.]

The Sauthoff amendment was defeated but when the bill reached the Senate language similar to the Sauthoff amendment was added which would have prevented the Secretary from limiting in any manner marketing of fluid milk. The present provisions of §8c(5)(G) are the same as those reported by the Senate and House conferees. The explanation of their action contained in the Conference Report clearly indicates their intention to draw a distinction between the authority of the Secretary with respect to fluid milk and his authority with respect to milk products. The explanation follows (H. Rept. No. 1757, 74th Cong., 1st Sess., p. 21):

> "Amendment No. 24: Under the House bill, no marketing agreement or order applicable to milk and its products in any marketing area could *prohibit the marketing in that area of any milk or product thereof* produced in any production area in the United States. The Senate amendment extended this provision so that no marketing agreement or order so applicable could *limit in any manner the marketing in the marketing area of milk or its products* produced anywhere except that cer-

tain limitations on the marketing of milk were specifically permitted. The conference argreement retains the House provision with respect to *prohibitions on marketing of both milk and products of milk.* The conference agreement also denies the authority to limit in any manner the marketing in any area of milk products (butter, cheese, cream, etc.) produced anywhere in the United States. The language adopted by the conference agreement does not refer to milk, *and so does not negative the applicability to milk, for use in fluid form or for manufacturing purposes, of the provisions of the bill relating to milk, such as the provisions on price fixing, price adjustment, payments for milk,* etc." [Emphasis added.]

When the House was considering the Conference Report a question arose with respect to the meaning of §8c(5)(G). The explanation which followed demonstrates that Congress was fully aware that regulation of milk on a regional basis as contemplated by the Bill would require some restrictions with respect to milk coming into the marketing area from outside sources. It also shows that Congress was cognizant of the fact that the decision of this Court in *Baldwin* v. *Seelig,* 294 U.S. 511 (1935), left the several states powerless to prescribe effective regulation in an interstate milk marketing area. These were real problems and Congress intended the Secretary of Agriculture to have power to deal with them. In response to the question of how the provisions of §8c(5)(G) would change the existing law, Congressman Jones said (79 Cong. Rec. 13022):

"Mr. Jones. The provisions of this particular bill would enable that area to be protected from being swamped with fluid milk from the outside, bought at any old price. For instance, if you do

not have the protection of this bill they would run into the same trouble they ran into in the New York milk cases, where they went into New Hampshire and bought milk at a lower price and came in and broke down your milk agreements. Under the provisions of this bill if a price were fixed in this particular area in New York, then if anyone bought milk from an outside area and brought it in he would be compelled to pay the producer the same price that was being paid the producers within the area *and comply with all regulations and requirements of that area.* For the first 2 months he would be required to take the manufacturer's price." (Emphasis added.)

It should be noted that Congress did not intend to confine the authority of the Secretary of Agriculture to meet this problem to the so-called "new producer" provisions of §8c(5)(D) of the Act. Representative Jones had something more in mind in stating that the handler of outside milk would be compelled to comply with "all regulations and requirements of that area". Immediately following the explanation by Representative Jones, Representative Hope asked this series of questions further illustrating that the authority of the Secretary under §8c(5)(G) permits the imposition of restrictions on outside milk:

"Mr. Hope. Is not this the change this amendment makes? Under the original Agricultural Adjustment Act power was given the Secretary of Agriculture to prescribe any rules or regulations which he might care to respecting the introduction of milk into any particular area; that is, bringing in milk from the outside.

"Mr. Jones. But the original amendments did not permit any orders governing the price to the producers?

"Mr. Hope. No; but otherwise the Secretary could make orders which would regulate the bringing in of milk from the outside into any particular milkshed, but under the amendments we are now considering the Secretary's power is limited. He cannot prohibit milk from coming in?

"Mr. Jones. That is correct.

"Mr. Hope. But he can prescribe some limitations?

"Mr. Jones. Yes; and he cannot prohibit the products of milk being brought into any area.

"Mr. Hope. No; but he can prescribe limitations on the importation of fluid milk.

"Mr. Snell. Then, as far as fluid milk is concerned, it is protected in certain markets, but, as far as the other products are concerned, they are not protected.

"Mr. Jones. That is correct."

As we indicated at the outset of our argument, the validity of the contested provisions of this Federal Order should be determined in light of the joint Federal-State program of milk regulation, a program which admittedly was designed for the benefit of producers. We are not dealing here, as was this Court in the *DuMond* case, with state action only in an area delegated to the province of the Federal Government. Here, both Federal and state governments have joined together to handle a problem which has been described by the District Court below as a "fundamental threat to the regulatory scheme". R. 215a

When viewed in light of the fundamental objectives of the Act and the regulatory scheme, the argument of Lehigh and Sunerest cannot be accepted. The record shows that Lehigh distributes approximately 4% and Sunerest approximately 5% of their milk in the marketing area covered by the Federal Order. The gist of their argument is that even as to this small percentage

of business they should be relieved of all regulation. In doing so, they would strike down reasonable regulations which have been found necessary to effectuate the Act by the Judicial Officer, the District Court, and the Court of Appeals below. The Court of Appeals below refused to interpret § 8c(5)(A) to "impute to Congress a policy in one section of the Act that would directly conflict with the comprehensive regulatory undertaking of the complete Act as conceived by Congress". R. 903. Having failed in that attack on the Federal Order, Lehigh and Sunerest now urge a construction of § 8c(5)(G) which also conflicts with the scheme of regulation contemplated by the Act. It, too, should be rejected. Clearly, the authority of the Secretary is not so limited by § 8c(5)(G) or any other provision of the Act.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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